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In The

Supreme Court of the United States

October Term, 1997

STANLEY J. GAMB,

Petitioner,

v.

HILTON HOTELS CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

STANLEY J. GAMB
2390 Windward Cove
Kissimmee, Florida 34746
Phone: (407) 847-2425

Pro Se

58 pp

QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Eleventh Circuit abused its discretion by improperly striking the proffered expert testimony of Dale Carson. The Court in its decision under Federal Rule of Evidence 702, erred by applying the scientific standard, rather than the germane specialized knowledge criterion in assessing Mr. Carson's qualifications. Mr. Carson's opinions were both reliable and relevant, and the striking of his testimony led to the granting of summary judgment in favor of Respondent for wiretapping and invasion of privacy.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioner has brought suit in an individual capacity and is not part of or affiliated with any corporation in an official or directorate capacity.

The United States Court of Appeals
for the Eleventh Circuit
Appeals Court

The Honorable Patricia C. Facwett
United States District Court
Middle District of Florida
Orlando Division
Trial Judge

Stanley J. Gamb
2390 Windward Cove
Kissimmee, Florida 34746
Petitioner/Pro Se

Hilton Hotels Corporation
Respondent

Robert Turk Esquire
Yoakley, Valdes-Fauli & Steward
One Biscayne Tower
Two South Biscayne Blvd., Suite 3400
Miami, Florida 33131
Attorney for Respondent

Raymond Kelly, Esquire
55 East Monroe Street, Suite 4200
Chicago, Illinois 60603
Attorney for Respondent

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PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this proceeding, to correct the erroneous legal standard announced by the Eleventh Circuit, and to address an issue of first impression involving an important legal issue.

OPINIONS BELOW

The United States Court of Appeals
for the Eleventh Circuit

DOCKET NUMBER 97-2164
(App. 1a-3a)

The Honorable Patricia C. Facwett
United States District Court
Middle District of Florida
Orlando Division

CASE NUMBER 95-466-CIV-ORL-19

(App. 4a-28a)

JURISDICTION

The Court of Appeals entered its judgment on December 5, 1998 (App. 1a-3a). The Petitioner's untimely petition for rehearing was denied on January 22, 1997 (App. 29a). The cause for Petitioner's untimely petition is outlined in his motion to this Court for Enlargement of Time, and granted until March 27, 1998.

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

The Petitioner in this action filed a seven count court complaint attesting that the Respondent did place an electronic eavesdropping device in his office and recorded two of his conversations with employees. Petitioner claims that this action: (1) Violated the *Omnibus Crime Control and Safe Streets Act of 1968*, 18 U.S.C. § 2510-2520, (2) The Florida Security of Communications Act, *Chapter 934, Florida Statutes (1993)*, and (3) Invasion of Privacy (intrusion), (4) Breach of Petitioner's employment contract with Respondent, (5) The Age Discrimination and Employment Act of 1967, (6) Retaliatory discharge under Chapter 448, Florida Statutes (1993), and (7) The Florida Civil Rights Act of 1992, Chapter 760, Florida Statutes. Counts four (4) through seven (7) of the complaint are not at issue because of monetary restriction imposed on Petitioner in filing this petition pro se.

HIRING OF PETITIONER

Petitioner was hired in the position of Security Director on July 26, 1993, for The Hilton Hotel at Walt Disney World Village ("the hotel") Orlando, Florida, As Director of Security, Petitioner's responsibilities consisted of managing a staff in charge of security, safety, and fire for the 833 room hotel. Petitioners qualifications included, but not limited to, twenty years of unblemished service with the New York City Police Department as a Detective

Sergeant, with assignments to Internal Affairs, a lateral transfer as a Federal Supervisor to the New York Drug Enforcement Administration Task Force, previous employment as a hotel Security Director, and certification by the New York City Fire Department as a Hotel/Motel Fire Safety Director.

LIFE SAFETY VIOLATIONS

During Petitioner's first three weeks of employment he discovered several matters that were either a violation of law and or presented an unsafe working environment, detrimental to the life safety of the hotel employees and guests. The management of Petitioner failed to correct the violations. Petitioner was bluntly told by his immediate supervisor Curtis Brown, Resident Manager, and James Haughney, General Manager that the violations would not be corrected because of monetary reasons. This eventually led to Petitioner's constructive discharge, on October 25, 1993, and affirmed by The Florida State Unemployment Commission, (R2-67 Exhibit 1).

BLOOD BORNE PATHOGEN VIOLATION

Petitioner discovered that all the Hilton Hotel Corporation on a national level were not in compliance with a Blood Borne Pathogen program, as required by the Occupational Health and Safety Administration ("O.S.H.A."),: Federal Register, *Occupational Exposure to Blood Borne Pathogens, 29 CFR Part 1910-1030.* This program was designed by O.S.H.A. to prevent the spread of Aids (H.I.V.), Hepatitis B and other contaminations that infect

blood in the work place. Respondent was in violation for the past fourteen (14) months.

FIRE HOSE VIOLATION

Petitioner also found problems with the fire hoses at the hotel. The hoses had not been inspected in ten (10) years. Fire hoses are required to be inspected annually in accordance with *O.S.H.A. regulation, 1910.158, 4-E-(iii).* Mr. John Steel, the hotel Director of Property Management testified: assenting the discrepancy and further stating that the Reedy Creek Fire Chief (responsible for inspections and compliance enforcement) had accepted on occasion complimentary meals during his visits to the hotel.

The primary source of firefighting at the hotel was the sprinkler system. The hoses and the fire extinguisher were secondary sources. That order could be reversed however depending on the type of fire. Annually employees of the hotel were required to attend and participate in a demonstration put on by the Reedy Creek Fire Department in the use of fire suppression equipment. Eventually, after Petitioner left employment, fifty-eight (58) of the sixty (60) fire hoses were replaced on or about September 27, 1994.

GUEST ROOM DOORS

Petitioner inspected numerous guest room doors at the hotel, and detected problems. There was no fire emergency evacuation plan on the first floor guest room doors. The doors had anti-loids that were not working. An anti-

loid is a device put into the locking mechanism to prevent someone from opening the lock by the use of a celluloid such as a credit card. There were also . . . problems with the dead bolt locks, as the dead bolts did not engage fully, thus causing it to disengage when pressure is applied by the mere use of a knife or similar object. The doors were not shutting properly, and latching due to defective spring tension in the door closing mechanism. Petitioner testified that based on his law enforcement and hotel experience: the criminal element could push on guest room doors to identify which doors were not latched, and then could enter to commit a crime there-in.

SEXUAL MISCONDUCT INCIDENT

Rosa Caceras is an employee in the security department of the hotel. Petitioner was Ms. Caceras' direct supervisor. Petitioner on several occasions wrote up Ms. Caceras for disciplinary problems. In one disciplinary report Ms. Caceras displayed her middle finger to Ms. Patricia Hawkins, Director of Human Resources, an Executive Committee member at the hotel. Ms. Hawkins then replied "I don't need the finger anymore. That's why I got married." Petitioner felt it was inappropriate to make jokes about female masturbation in the workplace. A disciplinary action report was prepared by Petitioner in the above matter. A copy of the report was also filed with the hotel Human Resources Department.

The incident was also reported by Petitioner to James Haughney, who was Ms. Hawkins immediate supervisor. Mr. Haughney told Petitioner that this type of conduct was unprofessional and he would investigate it. Mr.

Haughney acknowledged in deposition that he did not conduct an investigation into the matter.

FIRST INCIDENT OF ELECTRONIC EAVESDROPPING

Sometime before September 25, 1993 Ms. Caceras requested a private meeting with Petitioner to discuss a personal problem that was affecting her work. Petitioner told Ms. Caceras that he did not want to get involved in personal problems, then relented and agreed to the meeting after Ms. Caceras' repeated insistence. Both parties agreed to meet in the Petitioner's office on Saturday, September 25, 1993, at 1:00 p.m. Petitioner notified Mr. Brown (Petitioner's immediate supervisor) of the upcoming meeting and was encouraged by him to attend.

Petitioner was timely for the meeting, but had to wait some 30-45 minutes for Ms. Caceras. During this time Petitioner observed Ms. Hawkins arrive at the hotel carrying a bag and entered her office, which is directly across the hall from Petitioner's office. Ms. Caceras was also observed following Ms. Hawkins into the office. Shortly thereafter, Ms. Caceras emerged from Ms. Hawkins office and entered Petitioner's office for the scheduled meeting. Ms. Caceras complained about an underling in the security department who had not followed a direction of hers. Petitioner then admonished Ms. Caceras for requesting such a frivolous meeting on Petitioner's day off. Ms. Caceras then moved on to discuss that she was upset because of two employees taking too many breaks. After ending the meeting Ms. Caceras was observed by Petitioner entering Ms. Hawkins office.

Petitioner then left the hotel and returned to his residence. In deposition Ms. Hawkins admitted to being in her office on September [illegible], 1993, a day normally set aside as a day off for her, and her staff. This is one of the conversations Petitioner alleges was electronically recorded without his permission or knowledge. Security Officer Matthew Kritzer testified that on September 25, 1993, Ms. Hawkins did leave the hotel carrying a bag and failing to have it inspected as per the hotel requirement. Ms. Hawkins conceded this in her testimony.

SECOND INCIDENT OF ELECTRONIC EAVESDROPPING

On September 30, 1993, Petitioner was summoned into the office of Curtis Brown. Ms. Hawkins was also in attendance. Petitioner did not observe Ms. Hawkins taking any notes of the meeting, nor was she observed in possession of a note pad.

Mr. Brown opened the meeting by stating that there were problems in Petitioner's department. Mr. Brown went on to say that Ms. Caceras had alleged that petitioner asked her about her sexual orientation. During the meeting Petitioner was informed that his probationary period was extended for 60 days. The meeting lasted for approximately 45 minutes. Petitioner requested a memo from Mr. Brown outlining the meeting so that he may address the issues in writing, but to no avail. Petitioner alleges that this was the other conversation that was electronically recorded without his permission or knowledge.

FINDING OF ELECTRONIC TRANSMITTING DEVICE

Sometime within the following week Petitioner was in his office about to do the payroll. The payroll records were located on the top book shelf in Petitioner's office. When Petitioner looked up on the shelf he saw a wire coming out from behind a plate. The wire was attached to a small box, and Petitioner observed a spot for a microphone on the box. Petitioner then went into the outer security office and instructed security dispatcher Carmen Good to notify the Orange County Sheriff's Office to respond, and then went to Mr. Brown's office to report the finding of a electronic eavesdropping device, but to no avail. En route to Mr. Brown's office the Petitioner deactivated the device by removing a small watch type battery from its encasement, (in the event someone was monitoring the device,) and placed the battery in his pants pocket.

The police soon arrived and Petitioner turned the device over to them. The deputy informed Petitioner that the device was a short range transmitter and requested permission to search the immediate area for a receiving device. Mr. Brown then arrived at Petitioner's office, and was informed of the circumstances leading to the finding of the device and the deputy's request to search the immediate area. Mr. Brown requested to examine the battery, and was informed by Petitioner, the battery had been lost. Mr. Brown then stated that he had a meeting to go to, and left without granting permission to search the immediate area. The police did search the security department offices for an electronic receiver device, which met with negative results.

Subsequently the police tested the device and reported that the device was operational with a transmitting range of approximately twenty (20) to twenty-five feet (25). This clearly was within the range of the Human Resources Department, and Ms. Hawkins' office. The other two offices were located at the far end of the hallway and out of transmitting range.

FINDING OF TRANSCRIPTS

Following all of this, Petitioner on October 7, 1993 reviewed his personnel files located in the Human Resources Department's office. Petitioner discovered two documents prepared in transcript format of his meeting with Ms. Caceras and the meeting with Mr. Brown at issue, in his personnel file. The first document was prepared and signed by Ms. Caceras, and the second was prepared and signed by Ms. Hawkins.

Petitioner reviewed the transcript of the Caceras meeting. The transcript for the most part reflected what was said in the meeting. The majority of the transcript was a verbatim recitation of the conversation. However, the transcript was amended by inserting Ms. Caceras' allegation of the Petitioner's inquiry in to Ms. Caceras' sexual preference.

Petitioner also considered the second transcript to be a verbatim recording of his meeting with Mr. Brown and Ms. Hawkins. There were some omissions however. Petitioner's response to some complaints brought against him was left out. The contents of the transcript was contrived to display Petitioner in an unfavorable light.

Petitioner informed Mr. Haughney that based upon his law enforcement experience he had formulated an opinion that the transcripts were prepared from an electronic recording device.

PETITIONER'S RESIGNATION

After having examined the transcripts in his file, petitioner made the decision to resign from the hotel. Petitioner came to the decision based on all the incidents that had happened to him. Petitioner submitted his resignation letter, dated October 10, 1993.

The next day Petitioner was summoned to Mr. Haughney's office. Mr. Haughney told Petitioner he had reviewed the memo regarding the extension of his introductory period and felt that the items brought up by Mr. Brown and Ms. Hawkins were nitpicking. Mr. Haughney then went on to discuss the items in Petitioner's resignation letter. (R2-58-709). He asked Petitioner to reconsider his resignation. After the conversation, Petitioner felt confident that Mr. Haughney was going to take care of the issues.

On October 14, 1993, Mr. Haughney gave Petitioner a memo regarding their conversation. The memo contained a list of items that Mr. Haughney wanted completed in sixty (60) days or face termination. (R2-58-721-722). Petitioner decided to go through with his resignation because the requirements set forth were impossible to meet within the specified time frame. Issue at point: Ms. Lynn Sinon, replacement Security Director at the hotel for Petitioner,

testified on September 11, 1996 that she had not completed the assigned tasks as outlined in Mr. Haughney's memo.

Petitioner filed for unemployment compensation benefits which Respondent opposed. (R2-67-Exhibit 1). The burden was Petitioner's to show that his reasons for resigning amounted to good cause. (R2-67-Exhibit I). The referee found that the action alleged by petitioner, coupled with the indifference of his supervisors, demonstrated that the conditions of Petitioner's work environment would cause a reasonable person to leave employment. (R2-67-Exhibit I). Benefits were awarded.

REASONS FOR GRANTING PETITION

COURT DECISIONS

The district court in this case abused its discretion when it excluded the proffered expert testimony and report of Mr. Dale Carson, citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597, 113 S. Ct. 2786, 2799 (1993). "The court does not find Mr. Carson's testimony to be a reliable expert opinion nor does the court find his testimony to be necessary or proper subject for expert opinion." (App. 8a).

On appeal the 11th Circuit "review(s) the district court's ruling on a motion for summary judgment *de novo* and apply the same standards as those controlling the district court, in this issue." (App. 2a).

Central to the district court's granting of summary judgment on the wire tapping counts was the striking of

the expert testimony of Mr. Carson. The court found that "without Mr. Carson's testimony there was no issue of fact or inference precluding summary judgment on wire-tapping related counts". (App. 18a-19a, footnote 3).

SPECIALIZED KNOWLEDGE

In this case, Petitioner is seeking to admit the proffered expert witness Mr. Dale Carson as a expert with specialized knowledge under *Federal Rule of Evidence 702* ("FRE 702").

Federal Rule of Evidence 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

U.S. Supreme Court Justice Blackmun delivered the opinion of the Court in *Daubert v. Merrell Dow Pharmaceuticals*, and stated that Rule 702 also applies to technical, or specialized knowledge. "Our decision is limited to the scientific context because that is the nature of the expertise offered here." In principle the district court is saying that Mr. Carson's testimony is not consistent with a scientific standard. In this case, Petitioner is seeking to admit the proffered expert testimony of Mr. Dale Carson because his testimony is based on specialized knowledge, and not scientific knowledge. Therefore: the district, and appeals court's decision in this regard is erroneous both factually and legally, and abuse of discretion.

There is no more certain test for determining when experts may be used than the common sense inquiry, whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.

RELIABILITY ISSUE

The district court erred in finding that Mr. Carson's testimony did not meet the reliability standard. Mr. Carson's affidavit contained his methodology. He stated that he had conducted numerous criminal investigations involving electronic recordings over the past twenty two (22) years of service in law enforcement and private investigation practice. During his ten (10) years employment with The Federal Bureau of Investigation as a special agent, he has reviewed and created well over ten thousand (10,000) pages of transcripts. He has also written hundreds and hundreds of notes during interviews, and that the documents at issue in his opinion were developed by the transcribing and light editing of an electronic or stenographic recording of the actual conversation. Mr. Carson further stated that his laboratory is his field work and has taught interview interrogation, and note taking at the F.B.I. Academy and several other learning institutions. This is natural considering the nature of his profession. In addition to these skills, knowledge, and training, Mr. Carson possesses a Bachelors Degree of Arts in English.

The petitioner asserts that when an expert is relying on his experience or fieldwork then the manner of testing is through on-the-job experience. See *McCullock v. H.B. Fuller Co.*, 61 F.3d 1043 (2nd Cir. 1995) (expert can qualify through "extensive practical experience" which qualifies as specialized knowledge under FRE 702). An analogy to police experts is instructive here: *United States v. Brown*, cert. denied, 493 U.S. 898 (11th Cir. 1989) (police expert testimony as to drug terms); see also *United States v. Valle*, 72 F.3d 210 (11th Cir. 1995) (police expert testimony as to the characteristics of a crack addict); *United States v. Walls*, 70 F.3d 1323 (D.C. Cir. 1995) (police expert testimony as to drug terms); *United States v. Willis*, 61 F.3d 526 (7th Cir. 1995) (police expert testimony as to drug trade practices).

This Court and numerous federal courts have allowed a plethora of law enforcement officers and others to testify in various areas, see *Thomas v. Newton International*, 42 F.3d 1226 (9th Cir. 1994) (the court reversed and held that the witness's longshore experience, qualified him as an expert under FRE 702). These opinions were only formulated through on-the-job knowledge, skill, experience and training. Their knowledge did not come from books or scientific testing.

This Court has approved of expert testimony from law enforcement officers where the officer testified as to drug codes and a defendant's use of the term "paper," "candy," and "dresses" as reference to cocaine. *United States v. Brown*, 872 F.2d 385, 392 (11th Cir.) cert. denied, 493 U.S. 898 (1989).

It is hard to see where the Court reaches its conclusion that "there is nothing in the record which would indicate to the Court that Mr. Carson is an expert in the determination of whether a document is a transcript or an electronic or stenographic recording," (App. 9a). Mr. Carson's affidavit plainly states that this is what he has done for most of his law enforcement career. He listens to conversations using electronic methods. He then reduces those conversations to writing. The writing produced was transcripts in a format identical to the ones at issue here. Mr. Carson now teaches courses in this field. The reliability comes with the experience. A law enforcement officer who uses the same investigative techniques (that were originally taught by the F.B.I.) becomes an expert in the area and develops an indicia of reliability.

RELEVANCY ISSUE

The district court stated that in regard to Mr. Carson's testimony " [t]he Court does not find that a proper area for expert opinion," (App. 9a). Presumably, the Court was using a relevance standard in excluding the testimony here.

"Relevant evidence" is defined as "evidence having any tendency to make the existence of any issue that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Federal Rule of Evidence, 401.* Mr. Carson's testimony is relevant under the definition. His testimony is that because of the factors contained in documents are more likely than not the result of an electronically recorded conversation. Mr. Carson went through various

factors in determining whether the transcripts were reproduced from electronic recording. After going through the factors he reached the conclusion that:

> "the presence of one or two of the above listed characteristics could reasonably attribute to note taking or recollection however, based on the presence of multiple occurrences of the above listed characteristics, I believe the document at issue was developed by the transcribing and lightly editing an electronic or stenographic recording of the actual conversation."

Mr. Carson's methodology is fully developed to prove relevant. Any deficiencies is more the area for cross examination than exclusion. At a minimum an evidentiary hearing would have been appropriate. In numerous cases the courts have found that testimony that does not fall under the scientific provisions of FRE 702, but instead falls under specialized knowledge and should be admitted because it aided the trier of fact because, such testimony is not within the common knowledge of the average juror.

The district court improperly granted summary judgment when Petitioner presented evidence where reasonable inferences could be made that respondent engaged in the violations complained of. "Moreover, in deciding whether the district court erred, Petitioner reviewed the evidence in a light most favorable to, and with all reasonable inference drawn in favor of, the nonmoving party." *Adam v. Poag*, 61 F.3d 1537, 1542 (11th Cir. 1995) (citations omitted). "There is a genuine issue of material fact if the evidence is such that a reasonable jury could return a

verdict for the non-moving party. Credibility determinations, the weight of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. The evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in his favor. In other words, if a reasonable fact finder could draw more than one inference from the facts, and that a inference creates a genuine issue of material fact, then the court should refuse to grant summary judgment." *Cox v. Administrator U.S. Steel & Carneige*, 17 F.3d 1386, 1396 (11th Cir. 1994) (citations omitted).

DIRECT EVIDENCE ISSUE

In its Order, the trial court granted summary judgment to respondent on the wiretap counts because Petitioner "does not present any direct evidence to support his contention" (App. 13a), that his conversations were electronically recorded. The court went on to say that the "only relevant evidence that Petitioner had produced with regard to these counts is the fact that he found an electronic transmitting device in his office and there are memoranda of Caceras and Hawkins which deal with the two conversations at issue" (App. 16a). This is not correct. Petitioner produced other evidence (testimony of Winston Chishlom) that created an undisputed inference that Respondent engaged in the wiretapping. Mr. Chishlom (former employee at the hotel) testified that his conversation was also recorded.

The requirement of direct evidence that the trial court seems to impose has been directly rejected by this court for wiretap cases. *Scutieri v. Page*, 808 F.2d 785, 790

(11th Cir. 1987) ("Direct evidence may not be available based on the stealthiness of the invasion. The success of the wiretap ultimately depends upon secrecy and concealment"). In *Walker v. Darby*, 911 F.2d 1578 (11th Cir. 1990), the Court held that "Plaintiffs could establish a wiretapping claim with circumstantial evidence."

> The fact that most of the plaintiffs have no personal, first-hand knowledge that any particular phone call was taped is not remarkable . . . . The intentional tort of wiretapping created by *18 U.S.C. Sect 2520* is obviously one which its very nature is unknown to the Plaintiff.

(Quoting *Awbrey v. Great Atlantic & Pacific Tea Co., Inc.*, 505 F.Supp. 604, 606-07 (N.D. Georgia 1980).)

CIRCUMSTANTIAL EVIDENCE ISSUE

The trial court committed reversible error in granting summary judgment on the wiretap and invasion of privacy counts when Petitioner presented circumstantial evidence that could cause a reasonable juror to conclude that respondent did engage in such violations.

The same analysis applies here. Respondent is not going to secretly wiretap and then come forward and admit it as the trial judge is asking for. This matter is a case of circumstantial evidence where Respondent had the motive, the means and the opportunity to place an electronic eavesdropping device in Petitioner's office and in Mr. Brown's office. All of this put together presents a jury question that should not have been resolved at the summary judgment stage.

Petitioner in its response to the summary judgment made it clear though circumstantial evidence it was presenting could cause a reasonable juror to conclude that Petitioner was wiretapped. As Petitioner stated: 1) an operational listening device was found in his office, 2) the transmitting range of the device meant that only a handful of people could have listened to the conversation, one of those being Patricia Hawkins, 3) the only people that had knowledge of the Caceras' meeting before it occurred were Respondent, 4) Ms. Caceras and Ms. Hawkins was observed on the day of the Caceras' meeting entering and exiting her office with an unchecked package, 5) the transmitting device found in Petitioner's office is portable, concealable on a person and could have been used during both conversations, 6) Ms. Caceras and Ms. Hawkins had been written up for sexual misconduct by Petitioner, 7) Petitioner frequently complained to Mr. Brown and Mr. Haughney about life safety and health violations which both refused to correct for monetary reasons, 8) the transcripts presented were almost completely in dialogue form, 9) no notes were taken of the meetings from which the transcripts could have been produced, 10) the transcripts are in a completely different format from notes of other meetings taken about that same time by Ms. Hawkins, 11) both Ms. Caceras and Ms. Hawkins acknowledge preparing the items being referred to as transcripts; and 12) the transcripts were contained in the personnel file of petitioner which only the Human Resources Department had control of, 13) Ms. Hawkins had personal disagreements with Petitioner and was aware that Petitioner considered much of her behavior

unprofessional, 14) Ms. Caceras was reporting back to Ms. Hawkins unbeknownst to Petitioner, and 15) Mr. Brown refused to grant law enforcement permission to search premises. The district court however overlooked all of this circumstantial evidence in coming to its conclusion that Petitioner did not present an inference to preclude summary judgment.[1]

In analyzing the role of circumstantial evidence in a summary judgment proceeding the following analysis applies.

> Inferences must . . . be drawn in the light most favorable to the nonmoving party. . . . Inferences may be drawn from underlying facts that are not in dispute, such as background or contextual facts . . . and from underlying facts on which there is conflicting direct evidence but which the judge must assume may be resolved at trial in favor of the nonmoving party. Assuming the existence of these underlying facts, however, an inference as to another material fact may be drawn in favor of the nonmoving party only if it is "rational" or "reasonable" and otherwise permissible under the governing substantive law. . . .
>
> . . . If the non moving party produces direct evidence of a material fact, the court may not assess the credibility of this evidence nor weigh against it any conflicting evidence presented by

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[1] Petitioner also presented the expert testimony of Dale Carson. That testimony is discussed elsewhere in this Brief. If the testimony of Dale Carson is allowed then it's readily apparent that a sufficient jury quest has been presented.

> the moving party. The nonmoving party's evidence must be taken as true. Inferences from the nonmoving party's "specific facts" as to other material facts, however, may be drawn only if they are reasonable in view of other undisputed background or contextual facts and only if such inferences are otherwise permissible under the governing substantive law. This inquiry ensures that a "genuine" issue of material fact exists for the fact finder to resolve at trial.

Mize v. Jefferson City Board Of Education, 93 F.3d 739, 743 (11th Cir. 1996) (quoting *T.W. Electric Service v. Pacific Electric Contractors Association*, 809 F.2d 626, 631 (9th Cir. 1987)).

TRANSCRIPT ISSUE

The thrust of the wiretap counts centers around the transcripts. Petitioner acknowledges that the meetings occurred and that the documents produced came from Ms. Caceras and Ms. Hawkins. Petitioner is firm in his belief that Ms. Hawkins and Ms. Caceras did not take notes during the meeting. Ms. Hawkins testified otherwise in deposition, but Petitioner's statement in this regard must be accepted as true. This means that the document produced by Ms. Hawkins came either from her memory or by some sort of electronic recording. This is a jury question. Petitioner pointed out a number of items that made it more likely than not, this did not come from memory. Ms. Hawkins said she did the memoranda in dialogue format because she was busy during this time, and it was easier to prepare the memo in this format. She however did other memoranda during this

period of time that was in narrative format. Ms. Hawkins further stated when asked if she takes notes while she's talking, and replied; "No, that would be difficult to do". This is inconsistent with prior testimony and evidence (transcript) presented.

Petitioner acknowledged that the verbatim transcripts were edited. The trial court hinges on this to state that Petitioner said that the "document does not accurately reflect the conversation" (App. 18a). This was not the sum of Petitioner's testimony. Appellant said that the transcript did accurately reflect the conversation, but was edited to put him in a more negative light. If the transcript completely reflected every word of the conversation then there could be little doubt that a reasonable inference could be drawn that it came from an electronic recording and not someone's memory. Likewise, if a transcript memorializes a great percentage of a conversation with the omission of some items favorable to the person being recorded, a reasonable juror could conclude that the transcript came from an electronic recording as opposed to memory. In determining summary judgment for this matter, the question thus is, could a reasonable juror conclude from the transcripts in their current form, did they come from the participants' memory or more likely than not did they come from an electronic recording.

The district court summarily dismissed the import of the transcripts by stating that they do not accurately reflect the conversations held. Beside being factually wrong as to Petitioner's testimony, the trial court misses the argument being advanced by petitioner. The question

is not whether the transcripts accurately reflect the conversations held, but whether these edited transcripts were the product of an electronic recording or from the memory of Rosa Caceras and Patricia Hawkins.

CONCLUSION

WHEREFORE, for reasons stated, Petitioner respectfully requests that: the order granting summary judgment as to counts one (1) to three (3) inclusive, and the final judgment in favor of Respondent be Reversed; and that the order striking the proffered expert testimony of Dale Carson be REVERSED. The District Court has departed from the accepted and usual course of judicial proceeding, and was sanctioned by the 11th Circuit Court of Appeals. The Petitioner prays for an exercise of this Court's supervisory power.

Accordingly, the Petitioner respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

STANLEY J. GAMB
2390 Windward Cove
Kissimmee, Florida 34746
(407) 847-2425

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-2164
Non-Argument Calendar

D. C. Docket No. 95-466-CIV-ORL-19

STANLEY J. GAMB,

Plaintiff-Appellant,

versus

HILTON HOTELS CORP.,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(Filed December 5, 1997)

Before ANDERSON, BLACK and BARKETT, Circuit Judges.

PER CURIAM:

Stanley Gamb filed a seven count complaint asserting that his employer, Hilton Hotels Corporation wiretapped his office and recorded two of his conversations with other employees. He claims that this action: (1) violated the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520,; (2) the Florida Security of Communications Act, Chapter 934, Florida Statutes (1993),

and (3) invaded his privacy (intrusion). He also claims retaliatory discharge under § 448.102(1) of the Florida Statutes; breach of his employment contract; age discrimination in violation of the ADEA; and age discrimination in violation of the Florida Civil Rights Act of 1992.

The district court granted Hilton's motion for summary judgment on these claims finding that the only relevant evidence Plaintiff produced with regard to the wiretapping was the fact that an electronic recording device had been found in his office and that the employees with whom he had held the conversations that he asserts were recorded had submitted memo's of those conversations to Hilton. The district court concluded that Gamb had presented no evidence from which a reasonable juror could conclude that his conversations were recorded, much less recorded by Defendant, noting, among other things, that Plaintiff did not know whether the listening device he found was operational when he found it, conceded that the memoranda created by the employees did not accurately reflect the conversations, and only one of the allegedly recorded conversations occurred in the room where the "bug" had been found. Having reviewed the record, we conclude that the district court did not err in granting summary judgment on these claims.

We also find no error in the district court's order granting summary judgment on Gamb's claim pursuant to § 448.102(1) of the Florida Statutes. By its express terms, § 448.102(1) does not apply unless the employee has, in writing, brought the activity, policy or practice to the attention of his employer and afforded the employer a

reasonable opportunity to correct it. Gamb failed to comply with this requirement. Summary judgment on Gamb's breach of employment contract claim is not erroneous because the district court correctly found that the document entitled "Employee Safety Responsibility", upon which Gamb bases his claim, does not constitute an employment contract.

The trial court properly granted summary judgment in Hilton's favor on Gamb's age discrimination claims because Gamb presented no evidence to refute Hilton's legitimate, non-discriminatory reasons for its employment actions.

Finally, summary judgment was also appropriately entered on Gamb's FCRA claim because Gamb failed to exhaust his administrative remedies. Although Gamb filed a charge of discrimination with the Florida Human Rights Commission, the Commission made a determination of no cause to believe that Gamb was discriminated against due to his age. Thus, Gamb only could have properly filed suit if a hearing had been conducted by the Commission and the Commission had issued a final order finding a violation of the FCRA. *See* § 760.11(7), Fla. Stat. (1993)

AFFIRMED.

United States District Court

MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

STANELY J. GAMB

V.

HILTON HOTELS CORPORATION

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 95-466-CIV-ORL-19

(Filed Jan. 16, 1997)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came before the Court. and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the Plaintiff take nothing, that the action be dismissed on the merits, and that the Defendant, Hilton Hotels Corporation, recover of the Plaintiff, Stanley J. Gamb, his costs of action.

January 16, 1997
Date

RICHARD D. SLETTEN
Clerk

/s/ G. Schafer
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

STANLEY J. GAMB,

Plaintiff,

v. CASE NO. 95-466-CIV-ORL-19

HILTON HOTELS CORPORATION,

Defendant.

ORDER

(Filed Jan. 16, 1997)

This cause came before the Court on the following: (1) Defendant's Motion for Leave to File a Reply to Plaintiff's Response in Opposition to Defendant's Motion for Partial Summary Judgment as to Counts I-IV and Counts V, VI, and VII of Plaintiff's Complaint, and Memorandum of Law in Support (Doc. No. 77, filed December 10, 1996), Plaintiff's Objection to Defendant's Motion for Leave to File a Reply to Plaintiff's Response in Opposition to Defendant's Motions for Partial Summary Judgment and Supporting Memorandum of Law (Doc. No. 83, filed December 17, 1996), Plaintiff's Motion to Strike Defendant's Proposed Reply to Plaintiff's Response and Memorandum of Law in Opposition to Defendant's Motions for Partial Summary Judgment (Doc. No. 84, filed December 17, 1996), and Defendant's Response to Plaintiff's Motion to Strike Defendant's Proposed Reply to Plaintiff's Response and Memorandum of Law in Opposition to Defendant's Motions for Partial Summary Judgment

(Doc. No. 102, filed January 3, 1996); (2) Defendant's Motion to Strike the "Expert" Testimony of Dale C. Carson (Doc. No. 78, filed December 10, 1996), Defendant's Memorandum in Support of Motion to Strike (Doc. No. 79), and Plaintiff's Response to Defendant's Motion to Strike the Expert Testimony of Dale C. Carson (Doc. No. 87, filed December 23, 1996);

(3) Plaintiff's Motion to Strike Defendant's Motions for Partial Summary Judgment on Counts I through IV and Counts V, VI, and VII of Plaintiff's Complaint (Doc. No. 64, filed November 12, 1996), Plaintiff's Memorandum of Law in Support (Doc. No. 65), and Defendant's Response in Opposition to Plaintiff's Motion to Strike Defendant's Motions for Partial Summary Judgment (Doc. No. 71, filed November 26, 1996); and

(4) Defendant's Motion for Partial Summary Judgment as to Counts I-IV of the Complaint and Demand for Jury Trial (Doc. No. 43, filed November 1, 1996), Defendant's Statement of Material and Undisputed Facts (Doc. No. 44), Defendant's Memorandum of Law in Support (Doc. No. 45), Defendant's Motion for Partial Summary Judgment on Counts V, VI, and VII of Plaintiff's Complaint (Doc. No. 51, filed November 1, 1996), Defendant's Statement of Material and Undisputed Facts (Doc. No. 52), Defendant's Memorandum of Law in Support (Doc. No. 53), Plaintiff's Response and Memorandum of Law in Opposition to Defendant's Motions for Partial Summary Judgment (Doc. No. 67, filed November 15, 1996), and all deposition transcripts, affidavits, and declarations filed regarding Defendant's Motions for Partial Summary Judgment.

LEGAL ANALYSIS

1. Defendant's Motion for Leave to Reply to Plaintiff's Response and Plaintiff's Motion to Strike Defendant's Proposed Reply:

Defendant has moved for leave to reply to Plaintiff's response to Defendant's two motions for summary judgment. Defendant has already filed approximately sixty (60) pages on this issue, including two motions for partial summary judgment, two memoranda of law in support of those motions, and two briefs of "undisputed facts." The Court has not requested and does not find that any further filings are necessary for a determination of Defendant's motions for summary judgment. Accordingly, Defendant's Motion for Leave to File a Reply to Plaintiff's Response (Doc. No. 83) is **DENIED.** Further, Plaintiff's Motion to Strike Defendant's Proposed Reply (Doc. No. 84) is **GRANTED.** The Clerk shall return Defendant's proposed reply to Defendant.

2. Defendant's Motion to Strike Expert Testimony of Carson:

Defendant moves to strike the "expert" report and testimony of Dale Carson which Plaintiff relies upon in his response to one of Defendant's motions. Mr. Carson, who was not a contemporaneous participant in any of the events alleged by Plaintiff, has essentially testified that in his opinion a memorandum of a conversation held between Plaintiff and Ms. Hawkins and Mr. Brown was a transcript prepared from an audio or stenographic recording of this conversation although the preparer of the memorandum, Ms. Hawkins, testified it was prepared

from her notes of the conversation made contemporaneously at the time of the meeting and that she did not see or hear any audio or stenographic recording.[1]

> Federal Rule of Evidence 702 states:
>
> > If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In this case, Plaintiff is seeking to admit the report of Mr. Carson to create a question of fact regarding whether Defendant wiretapped conversations of Plaintiff. Rule 702 entrusts this Court with "the task of ensuring that an expert's testimony both rests on reliable foundation and is relevant to the task at hand." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597, 113 S. Ct. 2786, 2799 (1993). The Court does not find Mr. Carson's testimony to be a reliable expert opinion nor does the Court find his testimony to be a necessary or proper subject for expert opinion.

In his affidavit, Mr. Carson states that he has testified in trials, before grand juries, and in evidentiary suppression hearings regarding his evidence gathering techniques and the techniques involved in electronic surveillance. (Doc. No. 89, ¶ 6). However, Mr. Carson is not being asked to testify about investigative techniques

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[1] Mr. Carson did not review the memorandum of Ms. Caceres, which Plaintiff also alleges is a transcript of an audio recording.

in this case. Instead, he is being asked to render an opinion regarding whether a document is a transcript of an electronic or stenographic recording without having any knowledge of whether there was an electronic or stenographic recording. In his deposition, Mr. Carson testified that he has never in his career, before this case, been asked to make an expert opinion regarding whether a certain document truly reflects a conversation that took place. (Carson Dep., pp. 43-44). Further, though Mr. Carson's report states that Carson believes the document at issue was developed by transcribing the actual conversation, Mr. Carson testified that he did not even know if a conversation took place between these parties. (Carson Dep., pg. 38). Thus, there is nothing in the record which would indicate to the Court that Mr. Carson is an expert in the determination of whether a document is a transcript of an electronic or stenographic recording, and there is nothing in the record to indicate that Mr. Carson's opinion on this matter is reliable.

The Court also does not find that this is a proper area for expert opinion. The declaration of Curtis Brown states that he did not electronically record the conversation at issue. (Doc. No. 48, ¶ 4). Brown testified that the memorandum was prepared by Ms. Hawkins at his request and is not a verbatim rendition of the conversation. *Id.* The declaration of Patricia Hawkins also states that she did not electronically record the conversation at issue. (Doc. No. 49, ¶ 4). Hawkins stated that she created the memorandum from her notes of the meeting and her own recollection. *Id.* Further, Plaintiff testified at his deposition that certain things that were said during that meeting were not in the memorandum prepared by Hawkins.

See Gamb Dep., pp. 625-30. Without any other evidence, it appears that Plaintiff has presented the "expert" testimony of Carson solely to create a question of fact as to whether the conversation in question was recorded electronically.

The Court finds that Mr. Carson is not qualified as an expert to express a reliable opinion regarding whether a document is a transcript of a recorded conversation, and that he will not assist the trier of fact in understanding the evidence or determine a fact in issue. Thus, his testimony should be stricken.

Accordingly, Defendant's Motion to Strike the Expert Testimony of Dale C. Carson (Doc. No. 78) is **GRANTED**, and Carson's testimony will not be considered by this Court.

3. Plaintiff's Motion to Strike Defendant's Motions for Partial Summary Judgment:

Plaintiff has moved to strike Defendant's motions for partial summary judgment for violating Local Rule 3.01(c). Local Rule 3.01(c) states that "[a]bsent prior permission of the court, no party shall file any brief or legal memorandum in excess of twenty (20) pages in length." Defendant filed two motions for partial summary judgment on the same date with separate memoranda of law and separate statements of "material and undisputed facts." Plaintiff moves to strike these filings as violations of this rule.

Defendant argues that none of its legal memoranda in support of its two motions for partial summary judgment are over twenty (20) pages in length and that Federal Rule of Civil Procedure 56(b) allows a party to move for summary judgment at any time and does not limit a party to only one motion for summary judgment. Thus, under Defendant's theory, it could have filed seven motions for summary judgment (one for each count of Plaintiff's Complaint) with seven separate memoranda of law totaling 280 pages and still have been in compliance with the Rules of this Court.

The Court finds that though Defendant may not have violated the letter of Rule 3.01(c), it violated the spirit of the Rule. Defendant filed two motions for summary judgment on the same day with separate memoranda and separate statements of fact all totaling sixty (60) pages of filings. The purpose behind rule 3.01(c) is to limit the pages of filings to better allow the Court with its severely limited resources and extremely heavy case load to thoroughly review all submissions.

However, since the parties are scheduled on the February trial calendar, it is too late to strike Defendant's filings and allow it an opportunity to refile its pleadings in compliance with Local Rule 3.01(c). On the other hand, it would be a further waste of judicial resources to strike Defendant's filings and proceed to trial on potentially meritless claims. Thus, the Court in its discretion declines to strike Defendant's motions for partial summary judgment, and Plaintiff's Motion to Strike (Doc. No. 64) is **DENIED**. However, Defendant and its counsel are warned that in the future it must apply in advance to the Court for leave to exceed the page limitation in Rule

3.01(c) as the Rule requires, and any future filings which violate Rule 3.01(c) will immediately be stricken and returned, and sanctions will be imposed.

4. Defendant's Motions for Partial Summary Judgment:

In 1993 Plaintiff applied for the position of Director of Security/Safety at Defendant's Hotel at Walt Disney Village ("Defendant"). Plaintiff was 51 years old at the time he applied. (Gamb Dep., pg. 13). Plaintiff was hired by Defendant and began work on July 26, 1993. (Gamb Dep., pg. 285, 294). At the time Plaintiff was hired, Curtis Brown was the Resident Manager at the hotel, Jim Haughney was the General Manager, and Patricia Hawkins was the Director of Human Resources. Mr. Brown and Mr. Haughney made the decision to hire Plaintiff. (Haughney Dep, pg. 49; Hawkins Dep., pg. 84). Mr. Brown was Plaintiff's direct supervisor, and Mr. Haughney was Mr. Brown's direct supervisor. (Brown Dep., pg. 31; Gamb Dep., pg. 294; Haughney Dep., pg. 53).

On Plaintiff's first day of work, he signed a document titled Employee Safety Responsibility. (Gamb Dep., pp. 289-90; Exhibit E, Appendix to Motion for Partial Summary Judgment ("Appendix")).

Plaintiff alleges that Defendant electronically eavesdropped, or bugged, his office and claims that he is aware of two conversations which were electronically recorded without his knowledge or consent. One conversation was with Rosa Caceres, an employee of Defendant who worked under Plaintiff's supervision. This conversation

took place on September 25, 1993 in Plaintiff's office. (Doc. No. 50). Plaintiff alleges that the memorandum written by Ms. Caceres to memorialize the conversation is actually a transcript of an electronic recording. Plaintiff found an electronic recording device, or bug, on a bookshelf in his office on October 1, 1993. (Gamb Dep., pg. 659; Doc. No. 67, Exhibit E). Plaintiff does not know whether the bug was in his office on September 25, 1993. (Gamb Dep., pg. 606-07). Ms. Caceres testified that she did not electronically record any conversation with Plaintiff and has no knowledge of anyone electronically recording her conversation with Plaintiff. (Doc. No. 50).

The other conversation which Plaintiff alleges was electronically recorded took place in the office of Curtis Brown on or around September 30, 1993. (Doc. Nos. 48 and 49). Patricia Hawkins, Curtis Brown, and Plaintiff participated in that conversation. Plaintiff alleges that the memorandum of the conversation created by Patricia Hawkins was a transcript of an electronic recording. Plaintiff does not present any direct evidence to support this contention. Mr. Brown and Ms. Hawkins deny recording the conversation or having any knowledge that the conversation was recorded. (Doc. Nos. 48 and 49). In that conversation, Mr. Brown and Ms. Hawkins spoke with Plaintiff regarding problems Defendant was having with Plaintiff's work performance. (Brown Dep., pg. 127). At that meeting Brown informed Plaintiff that his introductory probationary period would be extended an extra 60 days. (Brown Dep., pg. 155; Hawkins Dep., pg. 184; Gamb Dep., pg. 611; Appendix Exhibit H).[2] On October

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[2] The record is clear that Plaintiff began work under an introductory probationary period. However, the record is

10, 1993 Plaintiff submitted a letter of resignation to the manager on duty at Defendant hotel. (Gamb Dep., pp. 704-05; Appendix Exhibit S). On October 11, 1993 Plaintiff met with James Haughney to discuss whether Plaintiff would reconsider his decision to resign. (Gamb Dep., pg. 708-710; Haughney Dep., pg. 132-33). Plaintiff then withdrew his resignation. (Gamb Dep., pg. 718; Haughney Dep., pp. 132-34). On October 14, 1993 Plaintiff met with Haughney again to discuss Plaintiff's continued employment with Defendant. (Gamb Dep., pg. 720). At that meeting, Mr. Haughney presented Plaintiff with a memorandum outlining the areas of Plaintiff's employment which needed improvement and asked Plaintiff to complete certain tasks within sixty (60) days. (Gamb. Dep., pg. 720-21). Plaintiff resubmitted his resignation that day. Plaintiff was 51 years old when he resigned his employment with Defendant. (Gamb Dep., pg. 13).

After Plaintiff resigned, he filed a charge of age discrimination with the Florida Human Rights Commission. (Appendix Exhibit K). After a no cause determination by the Commission, (Appendix Exhibit L), Plaintiff filed a Petition for Relief requesting a formal hearing on his discrimination claim. On November 15, 1994 Plaintiff requested withdrawal of his Petition prior to a determination on his claim. (Appendix Exhibit M). Following Plaintiff's request to withdraw the Petition, the Hearing Officer at the Division of Administrative Hearings canceled a scheduled hearing in Plaintiff's case and closed the file. (Appendix Exhibit N).

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unclear when the introductory period would have otherwise ended.

In October of 1993 Plaintiff also filed a complaint with the Occupational Health and Safety Administration ("OSHA"). (Gamb Dep., pp. 404, 743).

On May 3, 1995 Plaintiff filed a seven count Complaint in this Court. The Complaint asserts the following claims: Count I, violations of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, Count II, violations of the Florida Security of Communications Act, Chapter 934, Florida Statutes (1993), Count III, invasion of privacy (intrusion), Count IV, retaliatory discharge, Count V, breach of employment contract, Count VI, age discrimination in violation of the ADEA, and VII, age discrimination in violation of the Florida Civil Rights Act of 1992. In two separate motions Defendant has moved for summary judgment on all of Plaintiff's claims.

Summary judgment is authorized "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Summary judgment is appropriate only in circumstances where "the evidence is such that a reasonable jury could [not] return a verdict for the nonmoving party." *Id.* at 248. The moving party bears the burden of proving that no genuine issue of material fact exists. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). In determining whether the moving party has satisfied the burden, the Court considers all inferences drawn from the underlying facts in the light most favorable to the party

opposing the motion, and resolves all reasonable doubts against the moving party. *Anderson*, 477 U.S. at 255.

On a summary judgment motion the Court may not weigh conflicting evidence or weigh the credibility of the parties. *See Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 919 (11th Cir. 1993) (citation omitted). If a reasonable fact finder could draw more than one inference from the facts and that inference creates an issue of material fact, then the Court must not grant summary judgment. *Id.* (citation omitted).

The first three counts of Plaintiff's complaint revolve around the alleged electronic wiretapping of two conversations, the first between Plaintiff and Rosa Caceres in Plaintiff's office on September 25, 1993, and the second between Plaintiff, Patricia Hawkins, and Curtis Brown in Curtis Brown's office on or around September 30, 1993. Plaintiff has not created a question of fact regarding whether Defendant electronically recorded conversations in which Plaintiff participated, and thus judgment in favor of Defendant is appropriate on these three counts.

The only relevant evidence that Plaintiff had produced with regard to these three counts is the fact that he found an electronic recording device in his office and there are memoranda of Caceres and Hawkins which deal with the two conversations at issue. Plaintiff has not produced any evidence, or even created an inference, that Defendant electronically recorded the conversations of Plaintiff. First, regarding the Caceres conversation, Caceres testified that she did not electronically record the conversation and has no knowledge that anyone else electronically recorded the conversation. (Doc. No. 50).

Instead, Caceres testified that she was told by Hawkins after the conversation with Plaintiff to memorialize the conversation to the best of her recollection and that she wrote the memorandum of the conversation from her memory of it. *Id.* Plaintiff testified that he did not see the bug in his office the day of his conversation with Caceres. (Gamb Dep, pg. 607). Plaintiff also testified that he often left his office unlocked when he was working, and thus anyone would have access to his office during those times. *Id.* at 605-06. Plaintiff also testified that he has no personal knowledge of the taping and is not sure who taped the conversations he alleges were recorded. *Id.* at 598. Plaintiff never testified that he has seen or heard a tape recording of any of his conversations. Plaintiff also does not know whether the listening device he found was operational when he found it. *Id.* at 666. Finally, regarding the memorandum created by Caceres, Plaintiff claims that it is a transcript of the recorded conversation, but Plaintiff claims that the document does not accurately reflect the conversation. *Id.* at 595-97. In short, Plaintiff has presented no evidence from which a reasonable juror could conclude that this particular conversation was recorded, much less recorded by Defendant.

Plaintiff also has no evidence to support his conclusion that his conversation with Brown and Hawkins was recorded. All parties who participated admit that the conversation was held in Mr. Brown's office, not Plaintiff's office where the bug was found. Plaintiff's allegation that the memorandum created by Ms. Hawkins was a transcript is based solely on the fact that it was created quickly following the conversation and contains some

exact wording from the conversation as Plaintiff remembers it. Thus Plaintiff assumes that it is a transcript. *Id.* at 640. However, Plaintiff also claims that this "transcript" does not accurately reflect the conversation. *Id.* at 625-30. Both Brown and Hawkins have testified that they did not electronically record the conversation and have no knowlege [sic] of anyone else recording the conversation (Doc. Nos. 48 and 49). Plaintiff has produced no evidence to refute their sworn statements.[3] Plaintiff also has not produced any evidence which would create a question of fact as to whether any other employee of Defendant recorded a conversation of Plaintiff. Accordingly, judgment for Defendant is appropriate on the first three counts of Plaintiff's complaint.

Next, Defendant moves for summary judgment on Count IV of Plaintiff's Complaint, which alleges retaliatory discharge under § 448.102(1) of the Florida Statutes. That section states that an employer may not take any retaliatory personnel action against an employee because the employee has:

> (1) disclosed, or threatened to disclose, to any appropriate governmental agency, under oath, in writing, an activity, policy or practice of the employer that is in violation of a law, rule or regulation. However, this subsection does not apply unless the employee has, in writing, brought the activity, policy or practice to the attention of a supervisor or the employer and

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[3] As discussed *supra* in the discussion of Defendant's Motion to Strike the "Expert" Testimony of Dale Carson, Carson's opinion that the Hawkins memorandum is a transcript of a reported conversation will not be considered.

> has afforded the employer a reasonable opportunity to correct the activity, policy, or practice.

§ 448.102(1), Fla. Stat. (1993).

Initially, the Court notes that there is no evidence that Plaintiff brought to the attention of Defendant, in writing, a policy or practice of Defendant's that was in violation of the law and allowed a reasonable time for Defendant to correct that unlawful policy or practice. Plaintiff claims that Plaintiff provided written notice of Defendant's wrongful acts to Defendant on October 10, 1993 in his initial letter of resignation. (Doc. No. 67, Exhibit M). However, all Plaintiff states in his October 10 resignation letter is that one of the reasons for his resignation was that Defendant failed to provide a safe working environment. The Court finds that this does not satisfy the writing requirement of § 448.102(1). Further, Plaintiff resigned on October 15, 1993. Thus, even if Plaintiff had sufficiently stated an unlawful policy or practice of Defendant in his October 10 letter, Plaintiff did not give Defendant sufficient time to correct the problem.

Next, Plaintiff claims that he prepared written Standard Operating Procedures, or SOP's, on Bloodborne Pathogens for the Security Department which should satisfy the written requirement of § 448.102(1). Plaintiff has not submitted the SOP's to this Court, and the Court cannot find that, as a rule, a written standard operating procedure is a writing which brings an unlawful practice or policy to the attention of the employer.

Finally, Plaintiff testified that he did not recall threatening Defendant that he would contact OSHA or any

other government agency nor did he contact any government agency before he resigned from employment with Defendant. (Gamb Dep., pg. 399). Accordingly, the Court finds that as a matter of law Plaintiff has not satisfied the requirements of Florida Statute § 448.102(1), and judgment for Defendant on Count IV of the Complaint is appropriate.

Defendant next asserts that summary judgment in its favor is appropriate on Count V of Plaintiff's Complaint asserting breach of employment contract. Plaintiff asserts that a piece of paper signed by Plaintiff on his first day of employment with Defendant titled Employee Safety Responsibility (Doc. No. 67, Exhibit N) is an enforceable employment contract which was breached by Defendant. Defendant asserts that the Employee Safety Responsibility document is not an employment contract, and even if it is, Plaintiff has not demonstrated any damage by Defendant's alleged breach of that agreement.

The Employee Responsibility Statement is a single page document which begins by stating that "[t]he company's responsibility is to provide the employee with a safe place of employment that is free from obvious hazards by providing an ongoing safety awareness program." The document then lists a number of employee safety responsibilities. Finally, at the bottom of the document, just above the employee signature block, it states: "I have read and fully understand the safety policy of Hilton Hotels Corporation, and I will try my utmost to work safely and help maintain the high standards of the organization." No representative of Defendant Hilton has signed the document on which Plaintiff's signature appears.

The Court finds that Plaintiff has not created a question of fact as to whether this document is an employment contract. Instead, the Court finds that the Employee Safety Responsibility statement is merely a unilateral policy statement. It is settled law in Florida that "unilateral policy statements cannot, without more, give rise to an enforceable contract." *Linafelt v. Bev, Inc.*, 662 So. 2d 986, 989 (Fla. 1st DCA 1995); *see also Caster v. Hennessey*, 727 F.2d 1075 (11th Cir. 1984); *Muller v. Stromberg Carlson Corp.*, 427 So. 2d 266 (Fla. 2d DCA 1983).

Plaintiff signed the Employee Safety Responsibility statement on July 26, 1993, which was the day he began work with Defendant. Plaintiff was offered the job by Defendant before July 13, 1993. *See* Gamb Dep. pp. 461-62. Plaintiff testified that no one told him that he had to sign the document in order to get the job, and Defendant did not offer Plaintiff anything of value in exchange for signing the document. (Gamb. Dep., pg. 462). Finally, the Employee Safety Responsibility statement does not make any promises on the part of Defendant. Instead, it states that Defendant has a responsibility to provide employees with a safe work place. The document then contains a list of employee responsibilities which must be satisfied in order for Defendant to provide its employees with a safe work environment. This list appears to be nothing more than goals to be followed by the employee, and the Court finds as a matter of law that this document was a policy statement and not an employment contract. Thus, summary judgment shall be entered in favor of Defendant on Count V of Plaintiff's Complaint.

Finally, Defendant has moved for summary judgment on Counts VI and VII of Plaintiff's Complaint which

allege that Defendant discriminated against Plaintiff on the basis of his age in violation of the Age Discrimination in Employment Act ("ADEA") (Count VI) and the Florida Civil Rights Act of 1992 ("FCRA") (Count VII). Plaintiff's allegation of discrimination by Defendant based on Plaintiff's age is based on a single statement allegedly made by Curtis Brown, Plaintiff's supervisor. Plaintiff testified in his deposition that during a meeting between Plaintiff and Curtis Brown, Brown became annoyed with Plaintiff and told him that he was not the original candidate for the position of Security Director at Defendant Hotel. *See* Gamb Dep., pg. 476. Plaintiff avers that Curtis Brown stated that Joe Neely was the original candidate, and Brown "mentioned that Joe Neely was a younger candidate." *Id.* at 477.[4] No other comments were made about Plaintiff's age. *Id.* at 479.

Although the ADEA and the FCRA provide different remedies for age discrimination, courts have found the same analytical framework applicable under both Acts. *Pettis v. Brown Group Retail, Inc.*, 896 F. Supp. 1163, 1165 n.2 (N.D. Fla. 1995); *Bell v. Desoto Memorial Hospital, Inc.*, 842 F. Supp. 494, 497 (M.D. Fla. 1994). The plaintiff in an employment discrimination case is required to produce sufficient evidence "to support an inference that the defendant employer based its employment decision on an

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[4] Although Defendant states in its memorandum of law in support of one of its motions for partial summary judgment that Mr. Brown denies ever making such a statement, Defendant does not direct the Court, and the Court is unable to find, any place in the record where Mr. Brown states under oath that he made no such statement. Thus, for purposes of this analysis, the Court will assume that the statement was made.

illegal criterion." *Jameson v. Arrow Co.*, 75 F.3d 1528, 1531 (11th Cir. 1996) (citing *Alphin v. Sears Roebuck & Co.*, 940 F.2d 1497, 1500 (11th Cir. 1991)). The Court's inquiry at the summary judgment stage is whether "an ordinary person could reasonably infer discrimination if the facts presented remain unrebutted." *Id.*

Plaintiff may establish a *prima facie* case of age discrimination under the ADEA through the use of direct evidence of discriminatory intent, circumstantial evidence pursuant to a variation of the *McDonnell Douglas Corp. v. Green* test developed in the context of claims under Title VII, or statistical evidence of a pattern and practice of discrimination. *See e.g., Jameson*, 75 F.3d at 1531; *Corbin v. Southland Int'l Trucks*, 25 F.3d 1545, 1548 (11th Cir. 1994).

Plaintiff argues that the statement made by Brown is direct evidence of age discrimination. Direct evidence is that which, "if believed, would prove the existence of a fact without inference or presumption." *Carter v. City of Miami*, 870 F.2d 578, 581-82 (citing *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1558 n.13 (11th Cir. 1988)). The Eleventh Circuit has held that not all comments relating to an employee's age are direct evidence of discrimination. "[O]nly the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age, . . . constitute direct evidence of discrimination." *Id.* at 582. The Court finds that this single statement, standing alone, does not constitute direct evidence of discrimination. This statement cannot be interpreted to mean only that Curtis Brown intended to discriminate against Plaintiff based on his age. Thus, this statement

only constitutes circumstantial evidence of discrimination, which requires Plaintiff to establish a *prima facie* case of age discrimination.

To establish a *prima facie* case, Plaintiff must show that he was 1) a member of the protected group of persons between the ages of 40 and 70; 2) the subject of an adverse employment action; 3) replaced by a substantially younger person; and 4) qualified to do the job. *See, e.g., Jameson*, 75 F.3d at 1531; *Mitchell v. Worldwide Underwriters Ins. Co.*, 967 F.2d 565, 566 (11th Cir. 1992). The elements of a *prima facie* case of employment discrimination are not to be rigidly applied, especially in the area of age discrimination. *See, e.g., Jameson*, 75 F.3d at 1531; *Carter*, 870 F.2d at 583 (citation omitted) ("Age, unlike race or sex, 'is not a discreet and immutable characteristic of an employee which separates the members of the protected group indelibly from persons outside the protected group. Rather, age is a continuum along which the distinctions between employees are often subtle and relative ones.' ").

Defendant asserts that Plaintiff has not met the second and fourth elements of the *prima facie* case. First, Defendant argues that Plaintiff was not subject to an adverse employment action. Defendant claims it only extended Plaintiff's probationary period for sixty (60) days and Plaintiff resigned from employment. However, Plaintiff claims that Defendant not only extended his probationary period but also gave him unreasonable work requirements so that his resignation amounted to a constructive discharge.

To prove a claim of constructive discharge, Plaintiff must show that "his employer created conditions 'so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.' " *Castle*, 837 F.2d at 1559 (quoting *Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980)). After viewing all inferences in the light most favorable to Plaintiff, the Court finds that there is a material issue of fact regarding whether Plaintiff was constructively discharged and thus subject to an adverse employment action.

Defendant also argues that Plaintiff was not qualified to perform his job. However, since Defendant hired Plaintiff for the position and since the Court must resolve all inferences in favor of the nonmoving party, the Court finds that there is also sufficient evidence to make this a question for the jury.

Next, in accordance with the burden shifting requirements of *McDonnell Douglas*, if Plaintiff presents evidence of a *prima facie* case of age discrimination, Defendant must articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). If Defendant articulates a legitimate, nondiscriminatory reason for the adverse employment action, Plaintiff must show, by a preponderance of the evidence, that the reason(s) proffered by Defendant was merely a pretext for discrimination. *Id.* at 253. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* at 253 (citations omitted).

In this case Defendant has asserted that it extended Plaintiff's introductory probationary status and created a list of duties which Plaintiff was required to accomplish because Plaintiff's work was deficient. Deficiencies in Plaintiff's work included: Plaintiff did not follow his orientation schedule (Brown Dep., pp. 69-70); Plaintiff was untimely in producing standard operating procedures for the security department (Brown Dep., pp. 70-74, 82-83); Plaintiff was untimely in submitting a business plan for the security department which, when thereafter submitted numerous times was deficient, and had to ultimately be prepared by Mr. Brown (Brown Dep., pp. 83-94; Gamb Dep., pg. 317); Plaintiff gave to others the job of creating payroll forecasts for the security department instead of doing the job himself as he had been directed by Brown to do (Brown Dep., pp. 125-26); Plaintiff failed to implement a training program for his department on report writing as instructed (Brown Dep., pp. 126-27); and Plaintiff was tardy in preparing and submitting accident reports to the Human Resources Department. Brown also testified that Plaintiff had developed a reputation among his co-workers of lacking attentiveness and visibility in his Department. (Brown Dep., pg. 141). Finally, Plaintiff had been counseled for making sexist comments about the female employees in his office (Hawkins Dep., pp. 203-04), and had been accused of sexual harassment by a member of his own security staff. (Hawkins Dep., pp. 156-58). All of this occurred during the first three months of Plaintiff's employment. Thus, Defendant has met its burden of production, and the Plaintiff has the burden to prove by a preponderance of the evidence that the reasons presented are pretextual.

"A plaintiff may prove pretext 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Mayfield v. Patterson Pump Co.*, 101 F.3d 1371, 1376 (11th Cir. 1996) (quoting *Burdine*, 450 U.S. at 256). Since it is Plaintiff's burden to establish pretext, Plaintiff must present "significant probative" evidence on this issue to avoid summary judgment. *Id.* (quoting *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 443-44 (11th Cir. 1996).

In the instant case Plaintiff has not presented any evidence that Defendant's explanations for its actions were false or pretextual. Instead, Plaintiff simply relies on the one ambiguous statement of Mr. Brown concerning another applicant for the job to support his claim for discrimination. The Court finds that on the record in this case this statement alone is insufficient to avoid summary judgment. Accordingly, the Court finds that summary judgment in favor of Defendant on Counts VI and VII is appropriate.

CONCLUSION

Based on the foregoing, the Court rules as follows:

1. Defendant's Motion for Leave to File a Reply to Plaintiff's Response (Doc. No. 77) is **DENIED.**

2. Plaintiff's Motion to Strike Defendant's Proposed Reply (Doc. No. 84) is **GRANTED,** and the Clerk shall return Defendant's proposed reply to Defendant.

3. Defendant's Motion to Strike the Expert Testimony of Dale C. Carson (Doc. No. 78) is **GRANTED.**

4. Plaintiff's Motion to Strike Defendant's Motions for Partial Summary Judgment (Doc. No. 64) is **DENIED.**

5. Defendant's Motion for Partial Summary Judgment as to Counts I-IV of the Complaint (Doc. No. 43) is **GRANTED.**

6. Defendant's Motion for Partial Summary Judgment as to Counts V, VI, and VII of the Complaint (Doc. No. 51) is **GRANTED.**

The Clerk shall enter judgment in favor of Defendant on all Counts and close this case.

DONE AND ORDERED at Orlando, Florida, this 15th day January, 1997.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
All Counsel of Record.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

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479-3011

February 13, 1998

Mr. Stanley J. Gamb
2390 Windward Cove
Kissimmee, FL 34746

Re: Stanley J. Gamb
v. Hilton Hotels Corporation
Application No. A-585

Dear Mr. Gamb:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on February 13, 1998, extended the time to and including March 27, 1998.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Ruth Jones
Ruth Jones
Assistant Clerk